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Exonerated, But Not Free: The Prolonged Struggle for a Second Chance at a Stolen Life

NEWTON N. KNOWLES*

Introduction

Studies suggest that between 2.3% and 5% of United States prisoners have been wrongfully convicted.¹ There is data that shows that individuals eventually proven innocent through DNA analysis spend, on average, thirteen-and-a-half years locked away behind bars.² Adding insult to injury, once they have been proven innocent, many state governments do little to nothing to assist exonerees, whether through monetary compensation or reentry support programs.³ With no money, housing, transportation, health services, or insurance, and a criminal record that is rarely cleared despite proven innocence, the punishment lingers long after the conviction has been overturned.⁴ Compensation for people wrongly imprisoned varies widely by state, and twenty states have no statutory means of compensation at all.⁵

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1. Kelly Phillips Erb, *The Price of Freedom: What Happens to the Wrongfully Convicted?*, *Forbes* (May 1, 2012), <http://www.forbes.com/sites/kellyphillipserb/2012/05/01/the-price-of-freedom-what-happens-to-the-wrongfully-convicted>.

2. *Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT (Oct. 10, 2014), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/compensating-the-wrongly-convicted>.

3. *Id.*

4. *Id.*

5. *Id.*

Overall, approximately 40% of those released from prison after being wrongfully convicted and incarcerated receive no compensation for the miscarriage of justice in their case.⁶ Among the states that do provide some form of statutory post-exoneration compensation, the total capped amounts for the entirety of a compensation claim range from as little as \$20,000 (New Hampshire)⁷ and up to \$2,000,000 (Florida),⁸ with many states imposing restrictions on eligibility.⁹

Rather than face disenfranchisement upon returning home, exonerees must be entitled to the restoration of all their civil rights. The existing platform for which compensation may be achieved is grossly inadequate to accomplishing the diverse needs of the wrongfully convicted. This Note advocates for an alternative method similarly conceived by Professor Cathleen Burnett,¹⁰ however with a shift in responsibility. Rather than centralize the burden on the executive branch's responsibilities, an ad hoc regime, including the coordinated efforts of both judicial and extrajudicial practitioners, should replace the methods that are currently made available by way of state statutes, civil lawsuits, or the political process. When the state or federal government wrongfully convicts an individual, the only way to ensure due process is with the might of all three coordinated branches of government. This in turn is why each path to compensation on its own is ineffective and requires the consolidation of the various means under a centralized service-based model.

Part I of this Note will discuss a national survey of the various compensation statutes within the United States and some of the personal stories of those who have not been compensated for the time they were incarcerated. Part II will examine the three main avenues through which victims of wrongful convictions may seek relief, and the uphill battles they face in each instance. Part III will explore the challenges of reentry into the community and the lack of programs to assist in the return home. This Note will conclude by recommending an alternative compensation model similarly conceived by Professor Cathleen Burnett, with a slight shift in responsibility, and a look forward at how an individually tailored solution would work best in

6. Erb, *supra* note 1.

7. *New Hampshire*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing/NH> (last visited Apr. 4, 2015); see also N.H. REV. STAT. ANN. § 541-B:14 (2007).

8. *Florida*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing/FL> (last visited Apr. 4, 2015); see also FLA. STAT. § 961.06(1)(e) (2015).

9. *How is Your State Doing?*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing> (last visited Apr. 4, 2015).

10. Cathleen Burnett, *Restorative Justice and Wrongful Capital Convictions: A Simple Proposal*, 21 J. CONTEMP. CRIM. JUST. 272 (2005).

meeting the many challenges facing persons wrongfully convicted and incarcerated.

I. A Stolen Life and the National Response

On October 30, 1979, a white grocer named Mickey Cohen was shot and killed at his convenience store on the South Side of Chicago.¹¹ The man who fired the shots had previously asked for Kool-Aid and had browsed around the store.¹² After the shooting, the perpetrator went through Cohen's pockets and took approximately \$100 from the cash register before leaving through the front door.¹³ Three regular customers witnessed the murder, and described the perpetrator as an African-American man dressed in black.¹⁴ These three witnesses also noticed that the assailant touched various items with his bare hands.¹⁵ Police arrived, secured the scene, interviewed the witnesses and dusted for fingerprints.¹⁶

About thirty-six hours after the crime occurred, James Newsome was walking home from a friend's house when the police stopped him and another friend on an unrelated matter.¹⁷ They were taken into custody, only later to have the matter cleared up at the station house.¹⁸ However, that did not stop the police from questioning Newsome further.¹⁹ In a commonly used tactic of police deception, officers alluded that they had fingerprints linking Newsome to the murder that occurred at the South Side convenience store.²⁰ Even though the fingerprints the police had were not from Newsome, they put him in a lineup, where a witness identified him as the man who shot Mickey Cohen.²¹

Although an innocent person always holds out hope that the system will deliver justice, that notion quickly fled Newsome's mind when, in September 1980, he was convicted of murder and armed robbery.²² His conviction rested on problematic eyewitness testimony.²³ These three

11. LOLA VOLLEN & DAVE EGGERS, *SURVIVING JUSTICE: AMERICA'S WRONGFULLY CONVICTED AND EXONERATED*, 110 (3rd ed. 2008).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 107, 110.

18. *Id.* at 111.

19. *Id.* at 111–12.

20. *Id.* at 111.

21. *Id.*

22. *Id.* at 112–13.

23. *Id.* at 113.

eyewitnesses had made prior identifications; blaming Cohen's murder on persons other than Newsome.²⁴ Newsome was sentenced to life in prison and served fifteen years until he was released in 1994.²⁵ It was discovered in 1989 that the fingerprints the police obtained from the crime scene matched those of a man named Dennis Emerson, who was already serving a life sentence for another murder.²⁶ The police, however, did not reveal this information until 1994, when Newsome's lawyers obtained a court order requiring the Chicago Police Department to rerun the fingerprints.²⁷ After spending almost all of his twenties and every year of his thirties in prison, James Newsome was finally a free man.²⁸ Fortunately, Illinois law allowed for compensation of up to \$140,350 for persons wrongfully imprisoned for over fourteen years.²⁹ Additionally, in a 2003 private civil suit, a federal jury awarded Newsome \$1 million per year he was wrongfully incarcerated after finding that two of the five homicide detectives involved in his case coaching the eyewitness.³⁰

Given the fact that a large number of states do not compensate those who have been wrongfully convicted,³¹ James Newsome is among the lucky ones. Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Michigan, Nevada, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wyoming are the twenty states that do not offer compensation to exonorees.³² Consider the case of Joseph Amrine, convicted of murder and sentenced to death by the state of Missouri.³³ After exhausting his appeals, the Missouri Supreme Court finally granted a petition to reconsider. The court rejected the arguments of Assistant State Attorney General Frank A. Jung, who averred that, even if actually innocent, a prisoner should be executed if he had a fair trial.³⁴ After seventeen years on death row, Joseph Amrine walked out of prison a free man.³⁵ Unfortunately for him, Missouri did not have a

24. VOLLEN & EGGERS, *supra* note 11, at 113

25. *Id.* at 113, 120.

26. *Id.* at 118.

27. *Id.*

28. *Id.* at 120, 122 (Newsome spent the first 30 days of his "freedom" under home monitoring until he received a pardon from the governor of Illinois.).

29. *Id.* at 125.

30. *Id.*; see also *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003).

31. Compensating the Wrongly Convicted, *supra* note 2.

32. *Id.*

33. See *State v. Amrine*, 741 S.W.2d 665 (1987).

34. VOLLEN & EGGERS, *supra* note 11, at 310-11; see also *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (2003).

35. *Id.* at 312.

statute in place providing compensation to the wrongfully convicted.³⁶ Amrine received a fourteen-dollar refund from his inmate account and was sent on his way.³⁷

Stories like Amrine's are not uncommon, given that 40% of those wrongfully convicted are leaving prison today without receiving a penny in compensation.³⁸ In the states that do make reparations to the wrongfully imprisoned, compensation varies widely. In some states, exonerated prisoners receive a fixed award for each year spent inside: \$36,500 in California, \$5,000 in Wisconsin, \$50,000 in Alabama, \$15,000 in Louisiana, to name a few.³⁹ A former prisoner in Tennessee can claim up to a total of \$1 million and in New Hampshire, claims are capped at \$20,000.⁴⁰ New Jersey bases the amount according to lost income while incarcerated.⁴¹ Louisiana caps compensation at \$150,000 irrespective of the length of time served while other states offer post-release benefits such as free health care, counseling, and tuition.⁴² Montana, on the other hand, offers no financial compensation, providing only for educational aid, restricted to persons exonerated through DNA testing.⁴³

Some wrongful conviction compensation statutes place restrictions on eligibility. Nebraska, for example, requires that the wrongfully convicted person show that he did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement.⁴⁴ If the wrongfully convicted person falsely confessed or pled guilty, he must show that the confession was coerced.⁴⁵ Compensation is capped at \$500,000, regardless of time served.⁴⁶ In New York, the wrongfully convicted person must show he did not, by his own conduct or cause,

36. Missouri now compensates up to \$50 per day of post-conviction confinement subject to the limitation that only wrongfully convicted persons exonerated through DNA testing are eligible. See *Missouri*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing/MO> (last visited Apr. 4, 2015).

37. VOLLEN & EGGERS, *supra* note 11, at 315.

38. Erb, *supra* note 1; see also VOLLEN & EGGERS, *supra* note 11, at 315.

39. See CAL. PENAL CODE § 4904 (2014); WIS. STAT. § 775.05 (1987); ALA. CODE § 29-2-159 (2001); LA. REV. STAT. ANN. § 15:572.8 (2012); see also Erb, *supra* note 1.

40. Louise Radnofsky, *Compensating the Wrongly Convicted*, THE AMERICAN PROSPECT (July 24, 2007), <http://prospect.org/article/compensating-wrongly-convicted>; TENN. CODE ANN. § 9-8-108 (2013); N.H. REV. STAT. ANN. § 541-B:14 (2007).

41. N.J. STAT. ANN. § 52:4C-5 (1997).

42. LA. REV. STAT. ANN. § 15:572.8 (2012); *Wrongful Conviction Compensation Statutes*, CNN, <http://www.cnn.com/interactive/2012/03/us/table.wrongful.convictions> (last visited Apr. 3, 2015).

43. MONT. CODE ANN. § 53-1-214 (2003); *Compensating the Wrongly Convicted*, *supra* note 2.

44. NEB. REV. STAT. § 29-4603 (2009).

45. *Id.*

46. NEB. REV. STAT. § 29-4604 (2009).

bring about his conviction,⁴⁷ a provision that may prevent people who falsely confessed or pled guilty from receiving compensation. Utah provides for no more than fifteen years of compensation with each year's monetary equivalent being that of the average annual pay for a nonagricultural worker,⁴⁸ while Virginia's statute provides for 90% of the Virginia per capita personal income for up to twenty years, limited to those who have not pled guilty unless charged with a capital offense—any new felony conviction will end the claimant's right to annual compensation.⁴⁹

The federal government provides up to \$50,000 per year of wrongful imprisonment and \$100,000 per year on death row.⁵⁰ Currently, however, the compensation paid out may be subject to federal income taxes, depending on how the compensation is classified. Fairly recently, Representative Sam Johnson (R) of Texas introduced H.R. 4241, the Wrongful Convictions Tax Relief Act of 2012, to exclude any civil damages, restitution, or other monetary award, including compensatory or statutory damages and restitution imposed in a criminal matter relating to the incarceration of such individual, from gross income.⁵¹ The bill currently sits in the Committee on Ways and Means.⁵²

Professor Adele Bernhard⁵³ makes an argument for a more uniform compensation scheme within the several states.⁵⁴ Professor Bernhard argued that "a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a byproduct of the operation of a criminal justice system as large as ours."⁵⁵ She further stated that the state whose official actions have put individuals in prison for crimes they did not commit owes a debt to those who have lost many years and opportunities.⁵⁶ Accordingly, she opined that the debt should be recognized and paid.⁵⁷ For states that lack uniformity, one individual may receive a large sum of money

47. N.Y. CT. CL. ACT § 8-b (McKinney 2007).

48. UTAH CODE ANN. 1953 § 78B-9-405 (2008).

49. Va. Code Ann. § 8.01-195.10 (receipt of the award will act as a waiver of the right to sue).

50. *Compensating the Wrongly Convicted*, *supra* note 2.

51. Erb, *supra* note 1.

52. Wrongful Convictions Tax Relief Act of 2012, H.R. 4241, 112th Cong. (2012).

53. Professor Bernhard, Associate Professor at Pace University School of Law, also happens to be married to Peter Neufeld, co-founder of the Innocence Project.

54. Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 707-08 (2004).

55. *Id.* at 708.

56. *Id.*

57. *Id.*; see also Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999).

while another may receive little or nothing for the same injustice. A system that acts with such arbitrariness lacks integrity and contributes to the difficulty of obtaining compensation.

Take, for instance, the case of Calvin Johnson, a college-educated metro Atlanta man who was released in 1999 after spending sixteen years in prison.⁵⁸ DNA tests cleared him of rape charges, and the media attention surrounding the case resulted in Johnson receiving a compensation package of a local transit job, \$500,000 from the state of Georgia, and an apology from the district attorney who prosecuted his case.⁵⁹ Contrast this with the case of Sam Scott and Douglas Echols, both also from Georgia, who, a few years later, were cleared of a 1986 rape conviction by DNA evidence.⁶⁰ Scott and Echols received no compensation.⁶¹ No one filed lawsuits, nor did any senator volunteer to introduce special bills on their behalf.⁶² What accounts for these differences? It appears that without a good face and a heart-wrenching story the media attention just is not there. Without the support of the media, political figures may be reluctant to take on the political risks and capital that is required when advocating for the wrongfully convicted. The disparities that go along with compensating the wrongfully convicted motivates Bernhard's argument that statutes should create a uniform approach to compensating the unjustly convicted.⁶³

While a uniform approach for compensating the wrongfully convicted may alleviate some of the issues, there appears to be a lack of incentive to streamline this effort. By expanding the compensation scheme to include both judicial and extrajudicial professionals, a more holistic and beneficial system would arise addressing concerns that cannot be corrected with money alone. The impact of not receiving compensation will be discussed further in Part III, but before reaching that point it is important to explore the different paths through which the exonerated can currently seek relief.

58. Bernhard, *supra* note 54, at 709.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*; see also Bill Torpy, *Free Men, Lost Identities, DNA Cleared Them, but Prison Left Mark*, ATLANTA JOURNAL-CONST. (Oct. 5, 2003), <http://www.prisontalk.com/forums/archive/index.php/t-28172.html>.

63. Bernhard, *supra* note 54, at 708.

II. The Path to Freedom

Statutes that provide for some form of compensation for the wrongfully convicted are in place in 30 states plus Washington, D.C.,⁶⁴ however, getting the compensation itself is just half the battle. Each state's path to a prisoner receiving compensation has its own unique challenges that add to the difficulty of renewed freedom. As previously noted in Part I, many state statutes impose additional restrictions and limitations on whom among those exonerated qualify for compensation under the applicable scheme. The process of exoneration is daunting in and of itself, and more often than not proves to be a losing battle.⁶⁵ Even for those defendants who are exonerated, the uphill battle only gets steeper as the fight for a second chance at life begins post-exoneration. The following subsections explore the three main paths for which exonerees endeavor to seek redress for their time spent wrongfully incarcerated and the institutional barriers that are inherently associated with each.

A. State Statutes

Professor Bernhard is among those who argue that state statutes should be the preferred avenue for obtaining post exoneration relief and compensation.⁶⁶ While recognizing that many state statutes contain language essentially disqualifying a number of those who have been exonerated, Bernhard suggests a uniform approach to compensation as the most simple, clear, and effective method if done in the right way.⁶⁷ The remedy, she claims, is inexpensive and therefore does not require the creation of new bureaucratic agencies.⁶⁸ Furthermore, such "statutes bring rationality to a situation that can otherwise be more akin to a lottery or popularity contest."⁶⁹

Compensation statutes are comparatively easy to use and, in an ideal situation with a well-crafted statute, they resolve claims rapidly.⁷⁰ Consider for example, the case of Larry David Holdren, who obtained permission to retest the forensic evidence material used in his conviction, which proved that he was not responsible for the

64. *Compensating the Wrongly Convicted*, *supra* note 2.

65. *See id.*

66. Bernhard, *supra* note 54, at 707–08.

67. *Id.* at 708.

68. *Id.*

69. *Id.*

70. *Id.* at 709.

crime charged.⁷¹ His conviction was later reversed and the indictment against him dismissed.⁷² He brought a claim under West Virginia's compensation statute and, after reading Holdren's uncontested petition, the court concluded that the state was liable for the wrongful conviction.⁷³ After the court's ruling, the only issue left to decide was the amount of damages, which the court determined to be \$1.65 million, based on the expert testimony of an economist.⁷⁴ As Professor Bernhard observed, while some might contend that the award was too low, this allowed Holdren to recover relatively quickly and prevented him from having to finance complicated litigation.⁷⁵ He was not required to obtain a pardon, which might have been impossible.⁷⁶ Finally, the damages, while not copious provided a foundation upon which Holdren could begin to build a new life.⁷⁷

Stories like Larry Holdren's illustrate the relative ease that state statutes can provide for exonerees seeking to remedy the damages caused by their wrongful conviction. Provided that exonerees meet the base standards and qualifications under their respective statute, ideally the path to receiving compensation should be less onerous than the other alternatives.

The state statute approach, however, presupposes that the individual who has been exonerated is able to meet the requirements of the statute. This includes individuals like Jeffery Rodriguez, who spent more than five years in a Santa Clara County, California, jail before being declared factually innocent of the crime.⁷⁸ When Rodriguez applied for compensation from the state of California, a three-person state panel denied his request.⁷⁹

Under California Penal Code sections 4900 through 4906, the claimant is required to prove the facts set forth in the statement constituting the claim, including: (1) the fact that the crime he or she was charged with was either not committed at all or at least not committed by him or her; and (2) he or she sustained a pecuniary injury

71. *Holdren v. State*, No. CC-00-461 slip op. (W. Va. Ct. Cl. Apr. 2, 2002), available at <http://www.legis.state.wv.us/joint/court/decisions/CC-00-191.htm>.

72. *Id.*

73. *Id.*; see also Bernhard, *supra* note 54, n.40.

74. *Holdren*, No CC-00-461.

75. Bernhard, *supra* note 54, at 710.

76. *Id.*

77. *Id.*

78. Marie C Baca, *Wrongly Convicted Face Uphill Battle to Obtain Compensation*, CALIFORNIA WATCH (Mar. 5, 2011), <http://californiawatch.org/public-safety/wrongly-convicted-face-uphill-battle-obtain-compensation-9014>.

79. *Id.*

due to the erroneous conviction and subsequent imprisonment.⁸⁰ However, the California Victim Compensation and Government Claims Board (hereinafter "Board") will deny compensation claims if it finds by a preponderance of the evidence that the claimant pled guilty in order to protect another from prosecution.⁸¹

Section 4904 of the Code articulates that the Board will report the facts of the case and its conclusions to the next Legislature, including recommendations that the Legislature make appropriations for the purpose of indemnifying the claimant.⁸² The appropriation is to equal \$100 per day of incarceration and cannot be treated as gross income for tax purposes.⁸³

Much of the controversy surrounding these panel decisions is how the board interprets the preponderance of evidence standard of proof.⁸⁴ When a former inmate files a claim with the board⁸⁵ it is assigned to a hearing officer who determines whether the claim should move forward.⁸⁶ If the claim advances, the officer schedules a hearing and creates a report, which is reviewed by the chief counsel and presented to the board. Since the claim does not constitute a criminal proceeding, legal counsel is not provided for those who cannot afford to hire an attorney.⁸⁷

In opposition to state compensation statutes, Edwin Borchard "argues that when the state administers its justice system, to err is not illegal . . . if an innocent individual is by mistake convicted, this is a burden which, as a citizen of the State, he must bear; where there was an intentional wrong or illegality, the law does give wrongfully convicted individuals redress."⁸⁸ In another similar argument against compensation statutes it is said that the state, acting lawfully, can legally injure no one, and without fault there is no liability to compensate false positives.⁸⁹ This position, however, has been

80. *Baca*, *supra* note 78; see also CAL. PENAL CODE §§ 4900-4906 (2014).

81. CAL. PENAL CODE § 4903(c) (2014).

82. CAL. PENAL CODE § 4904 (2014).

83. *Id.*

84. *Id.*; see also CAL. PENAL CODE § 4903 (2014).

85. The California Victim Compensation and Government Claims Board is a State-run agency. In most cases, a person who is considering suing the State is required to first seek an administrative remedy with the Government Claims Program. For more information on the California Victim Compensation and Government Claims Board visit their website. *About the Board*, CA.GOV, <http://vcgcb.ca.gov/board> (last visited Apr. 5, 2015).

86. *Baca*, *supra* note 78.

87. *Id.*

88. Elina Tetelbaum, *Remedying a Lose-Lose Situation: How "No Win, No Fee" Can Incentivize Post-Conviction Relief for the Wrongly Convicted*, 9 CONN. PUB. INT. L.J. 301, 320-21 (2010).

89. *Id.* at 321-22.

criticized as being outdated and supplanted by decades of doctrinal developments within the law.⁹⁰ However outdated these arguments are, their influence still exists. The difficulty of first obtaining and retaining legal counsel that is good enough to navigate and wrangle through the morass of legal and administrative red tape, may be key to getting the full benefit of the justice system. In Tetelbaum's article, she notes Joseph King's criticism of the inadequacies of fault-based remedies and the uncertain nature of private congressional bills.⁹¹ However, King also urged that the statutory schemes of strict government liability become the necessary solution and that a no-fault liability system be put into place because "if compensation is to wait on culpable acts giving rise to a cause of action in tort for damages, many erroneous confinements will go unremedied."⁹²

B. Civil Lawsuits

For individuals who do not meet the base requirements for compensation under their state statutes, and for those residing within a state that provides no compensation at all, the second most common avenue for relief is through tort and civil rights law suits under 42 U.S.C. § 1983.⁹³ While civil lawsuits are a common means of seeking redress, in this context it presents its own host of obstacles. For starters, the right to counsel is only provided for defendants in a criminal trial.⁹⁴ Conversely, this means that exonerees are required to front the bill for obtaining legal representation on a chance that they may succeed in being awarded damages in a civil suit. This, in all likelihood, will be impossible for indigent exonerees and their families, who may have already exhausted all their resources to obtain the exoneration in the first place; not to mention the onerous process of seeking out the limited number of pro bono attorneys that may have other priorities. Another barrier to compensation are state tort statutes of limitations. These generally provide a two to three year period for a claim to be filed, starting to toll after the initial injury (e.g., the conviction), which accrue

90. Tetelbaum, *supra* note 88, at 322.

91. *Id.* (citing Joseph H. King, *Compensation of Persons Erroneously Confused by the State*, 1118 U. Pa. L. Rev. 1091, 1112 (1970)).

92. *Id.* (citing Joseph H. King, *Compensation of Persons Erroneously Confused by the State*, 1118 U. Pa. L. Rev. 1091, 1096 (1970)).

93. 42 U.S.C. § 1983 (1996).

94. *See* U.S. CONST. amend. VI; *see also* *Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972) (finding that counsel must be appointed in any case resulting in a sentence of actual imprisonment).

when a plaintiff knows or has reason to know of the tortuous act.⁹⁵

Individuals who pursue their claims for compensation under 42 U.S.C. § 1983 face yet another obstacle in that a state cannot be sued for damages, in either state or federal court, unless the state has waived its sovereign immunity and subjected itself to suit.⁹⁶ As a result, even if the wrongful conviction came about as a result of one or more state employees' activities, the state itself could not be sued and plaintiffs would need to seek relief from individual state actors who often lack sufficient financial resources.⁹⁷ However, cities and other municipal entities do not enjoy the same protections and therefore are not immunized from 42 U.S.C. § 1983 claims, so they can be found liable for the activities of their employees, so long as those activities were both unconstitutional and performed in accordance with the custom or policy of the municipality.⁹⁸ Furthermore, the doctrines of absolute and qualified immunity protect individual officials from personal suit. Indeed, most state officials who find themselves defending themselves against section 1983 suits are entitled to raise the affirmative defense of qualified immunity, which protects them from liability for any damages caused by the violation of the plaintiff's constitutional rights.⁹⁹

Among those who present the fiercest opposition to those seeking exoneration and compensation are the prosecutors who obtained the convictions. It may seem odd that an official charged with doing justice can become such an obstacle to exoneration when confronted with evidence of actual innocence. Prosecutorial resistance to post-conviction claims of innocence seems to have a major effect on post exoneration compensation, since in the first instance factual innocence must be established. Without this first step of prosecutorial cooperation in the face of exculpatory evidence, courtroom doors remain closed to those seeking redress.

Law professor Daniel Medwed examined the question of why prosecutors may turn a blind eye to post-conviction allegations of innocence, and how certain institutional and political barriers deter district attorneys' offices from recognizing potentially valid claims.¹⁰⁰ Among the institutional factors that contributed to the reluctance of

95. Tetelbaum, *supra* note 88, at 318–19.

96. 42 U.S.C. § 1983; *see also* Bernhard, *supra* note 54, at 723.

97. Bernhard, *supra* note 54, at 723–24.

98. *Id.* at 724.

99. Kit Kinsports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600–01 (1989).

100. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004).

some prosecutors to accept claims of innocence were the heavy emphasis district attorneys' offices place on conviction rates and the professional incentives to obtain and maintain their convictions.¹⁰¹ One's "win rate" may be determinative of future success, and both the individual prosecutor and the office as a whole have an interest in maintaining the legitimacy of past convictions.¹⁰² Taken together with the psychological and personal barriers for prosecutors confronting post-conviction innocence claims, those seeking post-conviction compensation must first overcome the egocentric personae that infest so many district attorneys' offices.¹⁰³

Evidence suggests that prosecutors have agreed to DNA testing in less than 50% of the cases in which such testing resulted in exoneration.¹⁰⁴ Some prosecutors have opposed these claims, despite the presence of exculpating evidence, including the DNA testing.¹⁰⁵ Other prosecutors have attempted to undermine potential post-conviction litigation by destroying biological evidence or encouraging defendants to waive their rights to preserve evidence.¹⁰⁶

As a preliminary matter, the vision of prosecutor as minister of justice runs counter to the actual measure of success imposed on prosecutors in many district attorney offices. Those with the highest conviction rates and therefore also reputations as the best performers, have the greatest chance for advancement.¹⁰⁷ Although individual prosecutors do not have explicit financial incentives for procuring convictions,¹⁰⁸ there are inducements implicit in a system that makes promotions contingent upon one's ability to obtain convictions.¹⁰⁹ Furthermore, office-wide conviction rates may be used as leverage in gaining resource concessions from the government in budget negotiations with the government.¹¹⁰ This is criticized because many cases are resolved through plea bargaining and the cases that actually go to trial are weak to begin with.¹¹¹

101. Medwed, *supra* note 100, at 134.

102. *Id.* at 134–36.

103. *Id.* at 136.

104. *Id.* at 129.

105. *Id.*

106. *Id.*

107. *Id.* at 135.

108. See Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 540–41 (1996); see generally Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

109. Medwed, *supra* note 100, at 135.

110. *Id.*

111. *Id.* at n.95.

As observed by Tetelbaum, there have been several proposals for increasing the accessibility of post-conviction relief.¹¹² She explains that a major shortcoming of these proposals is that they overlook how most incarcerated individuals are unable to obtain counsel for their post-conviction claims.¹¹³ States are not obligated by the Federal Constitution to provide counsel for collateral attacks, even in death penalty cases.¹¹⁴ Given the onerous task and the relatively small reward, many lawyers lack the monetary incentive to represent clients seeking post-exoneration compensation. Even in cases where compensation is probable, there is currently not enough economic incentive for private attorneys to zealously pursue post-conviction relief for wrongfully convicted individuals.¹¹⁵

A big contributor to the lack of economic incentive are the caps many state compensation statutes put on damages. When damages are capped, so are contingency fees. This simultaneously deters private lawyers from taking on post-exonerations cases on a contingency fee basis and incentivizes a strictly hourly compensation scheme, which is likely cost-prohibitive for most exonerees.¹¹⁶ Comparing post-exoneration compensation caps to the valuation of medical malpractice claims, a number of lawyers stated that they would not take a low-value medical malpractice case even if there were obvious malpractice.¹¹⁷ One lawyer explained, "We don't take low value medical malpractice cases because the damages may not be of a size that we can dedicate the office forces to handling that kind of case. You just can't stop the world and handle a \$25,000 malpractice case. You just can't do it."¹¹⁸ This lawyer estimated his office expends \$60,000 in out of pocket expense in a malpractice case.¹¹⁹ Comparing this formula to the context of post-conviction compensation claims, it is easy to see how caps on damages make it unlikely that a contingency fee arrangement would be worth an attorney's efforts when there is more to lose than can be gained.

112. Tetelbaum, *supra* note 88, at 305.

113. *Id.*

114. See *Murray v. Giarratano*, 429 U.S. 1 (1989); see also *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (declining to extend a federal constitutional right to counsel to a convicted person pursuing a discretionary direct appeal).

115. Tetelbaum, *supra* note 88, at 306.

116. *Id.*

117. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 659 (2006).

118. *Id.* at 660.

119. *Id.*

C. Private Congressional Bills and Executive Pardons

For those exonerees unable to pursue judicial remedies for post-conviction compensation, the final option is commonly to have a legislator introduce a private compensation bill. These “moral obligation” bills are specially drafted acts generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state.¹²⁰ While an exoneree that pursues compensation through a private bill avoids the legal immunities that protect government actors, this can present a “tougher row to hoe.”¹²¹ Where these bills have been passed, amounts have ranged from \$1,600 to nearly \$300,000 per year of wrongful imprisonment.¹²² However, according to the Innocence Project, only 9% of the more than 240 people who have been exonerated through DNA testing received compensation through private bills, making it the least likely remedy for the wrongfully convicted.¹²³

James Calvin Tillman is among the lucky few who benefited from a successful private bill initiative.¹²⁴ Tillman was not so lucky, however, when one night in January 1988, he was taken into police custody on the charge of rape.¹²⁵ A case of mistaken identify led to the wrongful conviction of Tillman, whereby he spent the next 16 years of his life behind bars for a crime he had not committed.¹²⁶ In 1990 Tillman arranged to have stains from the woman’s pantyhose and dress tested, but DNA testing at the time was not advanced enough to get a conclusive result.¹²⁷ With the help of updated technology, Tillman’s conviction was finally vacated in 2006 based on DNA evidence.¹²⁸ Tillman was released, making him the first person in Connecticut to be exonerated through the use of post-conviction DNA testing.¹²⁹ At the time, Connecticut did not have a compensation

120. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 93 (1999).

121. Evan J. Mandery, Amy Shlosberg, Valerie West, & Bennett Callaghan, *Compensation Statutes and Post-Exoneration Offending*, 103 J. OF CRIM. LAW AND CRIMINOLOGY 553, 558 (2013).

122. THE INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 13 (2009).

123. *Id.*

124. Giovanna Shay, *What We Can Learn About Appeals From Mr. Tillman’s Case: More Lessons From Another DNA Exoneration*, 77 U. CIN. L. REV. 1499, 1503 (2009).

125. *Id.* at 1511–12.

126. *James Tillman*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/james-tillman> (last visited Apr. 5, 2015).

127. *Id.*

128. Shay, *supra* note 124, at 1501.

129. *Id.*

statute for the wrongfully convicted, leaving Tillman out on his own.¹³⁰ In 2007, however, the Connecticut state legislature approved a private bill awarding Tillman \$5 million in compensation for the injustice that he suffered.¹³¹

Many, including Professor Bernhard, believe that the private bills are an inadequate solution for wrongfully convicted individuals.¹³² Some states even interpret their constitutions to forbid the use of such legislative acts, eliminating the private bill as an option.¹³³ Additionally, the success of any such private bill depends more on the political connection of the person introducing the bill and the political climate of the day than on the merits of the case.¹³⁴ Often, the process can be lengthy and the outcome uncertain.¹³⁵ Finally, once passed, a private bill must be signed into law by the governor, and it has been observed that gubernatorial treatment of such legislation has never been consistent.¹³⁶

Arguably, the disparity that takes place within the states make it so that each individual method on its own is ill suited for such a serious problem. State governments would benefit from a centralized inter-branch taskforce charged with the responsibility of seeing to the needs of those who have been wrongfully convicted and exonerated. Once a victim has succeeded in meeting the perverse burden of proving their innocence, the response to cure this injustice should begin immediately. The most effective way would be to establish a coalition taskforce comprised of individuals who can mount a claim on behalf of the exoneree. By establishing an administrative entity that would include judicial, executive, and legislative advocates, the political process is removed from the conflict, enabling the focus to remain with the exoneree as they transition back into society. Ideally, deferential authority would be given to this agency in an effort to avoid the procedural red tape that plagues each branch-specific avenue of compensation analyzed above. Given the relatively low instances for which an individual is actually declared innocent after being wrongfully convicted, the cost to the state or federal

130. Shay, *supra* note 124, at 1503.

131. *Id.*; *Connecticut Legislature Awards \$5 Million to Exoneree*, THE INNOCENCE PROJECT (May 21, 2007), <http://www.innocenceproject.org/news-events-exonerations/connecticut-legislature-awards-5-million-to-exoneree>.

132. Bernhard, *supra* note 120, at 94.

133. *Id.*; see also *id.* at n.85 (citing to state constitutions and case law demonstrating prohibitions in Oregon, Oklahoma, New Jersey, and Texas).

134. *Id.* at 94.

135. *Id.*

136. *Id.* at 96.

government to establish these types of agencies would be minimal.

Now returning to James Tillman, even though the bars were gone, it took some time for him to get used to his newfound freedom.¹³⁷ The process of readjustment was made all the more easier because of the financial leverage he now had in facing the challenges of reentry and returning home.¹³⁸ For all too many, however, the right to return home is just half the battle. Once released, new challenges present themselves as exonerees learn the hard way that freedom is not free of all cost.

III. Returning Home and the Challenges Of Reentry

As Joan Petersilia remarks in the introduction of her book *When Prisoners Come Home*, “[o]ne of the most profound challenges facing American society is the reintegration of the more than 600,000 adults—about 1,600 a day—who leave state and federal prisons and return home each year.”¹³⁹ The wrongfully convicted face a unique challenge as they return home, often in a position worse than that of a person who was legitimately convicted. Exonerees face the paradox of being innocent and yet ineligible for post-release programs that often accompany parole.¹⁴⁰ Since exonerees, in most cases, have been declared factually innocent, they are released back into their communities with no further assistance from the state.¹⁴¹ Ironically, factually guilty parolees also get the benefit of post-release programs, such as skills training, and drug and addiction support to aid their reintegration.¹⁴² This Part of the Note explores the challenges of reentry that are unique to those who have been wrongfully incarcerated and released back into the outside community. They face the same predicament almost all post-release individuals encounter, however with the added hardship of being innocent and thereby ineligible for typical resources and avenues set aside for reentry support.

137. Matthew Engelhardt, *Living With Conviction: The James Tillman Story*, GOODWIN MAGAZINE 12 (Spring 2011), http://www.goodwin.edu/pdfs/GC_Magazine_2011Spring_WebVersion.pdf.

138. See generally *id.*

139. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 3 (2003).

140. See *Support the Exonerated*, INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/social-work> (last visited Apr. 16, 2015).

141. See *id.*

142. See *id.*

A. Compensation and its Effect on Recidivism

In 2002, a participant on a panel hosted by the Illinois Criminal Justice Information Authority spoke about the lack of assistance the criminal justice system provided, explaining that:

Nothing was available when I walked out of prison. Absolutely nothing – we received no assistance at all. That was why I was in such a hurry, so anxious to find a job. I wanted to re-establish that I could support myself. To see that the state showed no interest at all in our plight, I had no choice but to try to . . . we started to promote ourselves, using different avenues to promote ourselves to get assistance from whatever organization would be willing to assist us. The state of Illinois gave us no assistance at all, until we had to go to court, go through legal procedures. It just didn't seem like it was the just thing to do in a civilized society.¹⁴³

In 2013, the authors of *Criminology: Compensation Statutes and Post-Exoneration Offending* have stated:

The universe of people who have been convicted and later absolved of a crime is small, and those who receive compensation comprise an even smaller subset of that group Research on prison releasees suggests that exonerees are potentially at a high risk for offending following their release. Though they are innocent of the charges for which they were incarcerated, there is no reason to think that they are immune from the detrimental effect that prison has on prisoners. It is well established that prison can habituate criminal behavior.¹⁴⁴

While the authors conceded that data has not been collected on how exonerees are impacted by prison, they found support in the abundant research on how prisons can act as a school for crime.¹⁴⁵

The inclination of criminal behavior, coupled with the lack of

143. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, THE NEEDS OF THE WRONGFULLY CONVICTED: A REPORT ON A PANEL DISCUSSION 3 (2002), available at <http://www.icjia.state.il.us/public/pdf/ResearchReports/Needs.pdf>.

144. Mandery et al., *supra* note 121, at 554.

145. *Id.* at n.4.

services available to exonerees, creates a high risk for exonerees to commit crimes, landing them back into prison. Data shows that the average time exonerees spent wrongfully incarcerated was more than thirteen years,¹⁴⁶ advancing the theory that exonerees are at a substantial risk for post-release offending.¹⁴⁷

Post-exoneration compensation, however, seems to have a positive effect on reentry into the community. Exonerees who are compensated above a threshold amount of \$500,000 commit offenses at a significantly lower rate than those who are either not compensated or compensated beneath the threshold level.¹⁴⁸ One study shows that those exonerees who received compensation were less likely to commit a post-exoneration offense, suggesting that compensation has a positive effect on exonerees the more they are compensated, the less likely they are to offend after exoneration.¹⁴⁹

B. How the Prison Effect Curtails Reentry

It just didn't seem fair that after you take [eighteen] years of a person's life and you think now you can send them out into the world and everything's going to be all right because now they have their freedom? Yeah, freedom is very important but you also have to have a lot of different things set up for people You have to have programs for people who are wrongfully convicted because there are a number of people wrongfully convicted—here is a panel of people wrongfully convicted—so why isn't there anything in place right now in the state of Illinois to help the wrongfully convicted after they are exonerated and freed?¹⁵⁰

People exiting prison need, but often do not have, physical and mental health care, education, food, housing, jobs, and a support network.¹⁵¹ Exonerees may not qualify for ex-offender services because they are technically not ex-offenders or parolees.¹⁵² Thus, exonerees cannot take advantage of prerelease counseling, job training, substance abuse treatment, housing assistance, and have no go-to person, that

146. *Compensating the Wrongly Convicted*, *supra* note 2.

147. Mandery et al., *supra* note 121, at 555.

148. *Id.* at 556.

149. *Id.* at 572.

150. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, *supra* note 143, at 2.

151. See Burnett, *supra* note 10, at 274.

152. Mandery et al., *supra* note 121, at 578.

parolees commonly receive.¹⁵³ Typically, released exonerees receive no more than clothing for the day, a bus ticket, and what is called gate money, which generally ranges from \$10 to \$150, to reenter society, find employment, and begin their lives anew.¹⁵⁴

In a roundtable panel discussion and report prepared for Illinois Governor George Ryan's Commission on Capital Punishment, among the recognized needs of reentering exonerees included the need for: immediate assistance upon release from prison, counseling, emergency funding to help them get back on their feet, and overcoming anger and distrust of the criminal justice system.¹⁵⁵ Illinois is among the minority of states who provide post-exoneration support services along with monetary compensation.¹⁵⁶ In 2004, Massachusetts became the first state to create such a statutory scheme, offering compensation up to \$500,000 and allowing courts to grant, in their discretion, state services that are reasonable and necessary to address any deficiencies in the individual's physical and emotional condition as a result of his or her erroneous conviction and resulting incarceration.¹⁵⁷

Among the biophysical and tangible needs exonerees require, the psychological demands of the wrongfully convicted can pose even more of a challenge. The clinical findings of psychiatric assessments indicate prevalent and often severe mental health and adjustment problems.¹⁵⁸ After release, most men were described by their families and others as changed in personality, and displaying features of post-traumatic stress disorder.¹⁵⁹ They displayed additional difficulties in psychological and social adjustment, particularly in close relationships.¹⁶⁰ What is most interesting about the Grounds article is the suggestion that those who have been wrongfully convicted face psychological challenges that are uniquely tied to the wrongful conviction itself.¹⁶¹ The available accounts that describe the

153. See Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), <http://www.nytimes.com/2007/11/25/us/25 dna.html>.

154. Mandery et al., *supra* note 121, at 578.

155. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, *supra* note 143, at 2, 3–6.

156. THE INNOCENCE PROJECT, *supra* note 122, at 28.

157. See MASS. GEN. LAWS ch. 258D, § 5 (2004); see also Massachusetts, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing/MA> (last visited Apr. 5, 2015); see also Nebraska, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/how-is-your-state-doing/NE> (Nebraska offering \$500,000 in compensation beginning in 2009) (last visited Apr. 5, 2015).

158. Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, 2 (2005).

159. *Id.*

160. *Id.*

161. *Id.*

psychological effects of wrongful conviction and imprisonment are predominantly biographical or autobiographical accounts given by individuals through books, television documentaries, and media interviews, many contain graphic descriptions of difficulties in adjustment and coming to terms with what happened.¹⁶² An account from one participant in the study conducted by Rimer and Simon explained that:

Life is sort of messed up right now. I feel like I'm in prison right now. My wife would ask me: "Where are you going? When are you going to be home?" It was like she was the warden. Chronologically, I'm thirty-seven; psychologically and most of the time I'm older than that. But sometimes, like when I go out, I'm only twenty-five years old—I didn't lose those twelve years; they took those years. My point of view is that when you have time like that taken from you and come back into society, what is so called normal society, you tend to automatically go back to that age you left behind. You're living at the age again, you're catching up to the world, it's like life has stopped.¹⁶³

These forms of psychological trauma underpin the unique challenges that exonerees face when they reenter society. These severe reactions often could not be attributed to preexisting conditions, because evidence indicated that they occurred in exonerees with normal and stable personalities.¹⁶⁴ Rather, these reactions were caused by external traumatic events.¹⁶⁵ Exonerees who have become accustomed to the prison regime find it even more difficult to cope with the drastic changes that confront them upon release. Adaptation to prison has made it difficult for some individuals to tolerate living in a household where others moved their possessions and household items.¹⁶⁶ Current technology is foreign, and with that comes humiliation, self-consciousness, fear, and regression. One man described how he would eat food cold because he did not know how to use a microwave.¹⁶⁷ Another, when shopping in town, used to push people out of the way, and when queuing at a checkout, he could not tolerate people standing behind him and would sometimes leave his shopping cart and walk

162. Grounds, *supra* note 158, at 11.

163. *Id.* at 12.

164. *Id.* at 13.

165. *Id.*

166. *Id.* at 30.

167. *Id.* at 29.

out.¹⁶⁸ Overall, it appeared that these psychological and adjustment difficulties were due to the injustice of their wrongful conviction and long-term imprisonment.¹⁶⁹

IV. Looking Forward to Change

Cathleen Burnett posited an alternative approach to the current wrongful conviction compensation schemes and restorative justice framework, and proposed to put, in its place, an extrajudicial approach grounded in the executive branch's responsibility to provide for the administration of justice.¹⁷⁰ Howard Zehr offered five restorative justice questions for helping to craft a solution to the harms sustained by those wrongfully convicted: "(1) Who has been hurt? (2) What are their needs? (3) Whose obligations are these? (4) Who has a stake in this situation? (5) What is the appropriate process in which to involve stakeholders in an effort to put things right?"¹⁷¹

Who has been hurt? Under the first prong, it is suggested that the entity, whether it be a governor, a parole board, a prosecutor, or a court granting judicial relief, has the legal obligation of notifying the individual that he or she qualifies for relief.¹⁷² That same entity should be allowed to declare actual innocence so that the exoneree would not have to re-litigate the matter.¹⁷³ Going beyond notification to the individual, that same entity should also be required to notify a state-level office whenever a person is to be released due to any of the innocence criteria for eligibility, creating a simple and efficient administrative program to resolve the needs of the victims similar to the federal model—the Victim Compensation Fund—devised to assist the victims of the September 11 tragedy.¹⁷⁴ The Victim Compensation Fund serves as a model by providing a no-fault alternative to litigation. Under the Victim Compensation Fund program, the average payout was about \$1 million with money being made available to sustain the victim while the review was taking place.¹⁷⁵

What are their needs? It would first be important for a restorative justice case worker to meet the individual being released

168. Grounds, *supra* note 158, at 59

169. *Id.* at 45.

170. Burnett, *supra* note 10, at 272–73.

171. *Id.* at 281.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 282.

from prison, which would ideally take place before actual release.¹⁷⁶ This case worker would help the individual get set up in a foster home or in an apartment, if family is not an appropriate initial destination, and would generally be available to coordinate support services for the former prisoner in addressing challenges.¹⁷⁷

Whose obligations are these? The social contract between individuals and the community anticipates that since the government acts as the representative of the entire community, it will provide a safety net for those most needy.¹⁷⁸ The community has a responsibility to support and help victims of crime to meet their needs; the community bears a responsibility for the welfare of its members and the social conditions and relationships that promote both crime and community peace; the community has responsibilities to support efforts to integrate offenders into the community, to be actively involved in the definitions of offender obligations, and to ensure opportunities for offenders to make amends.¹⁷⁹ Accordingly, the entire state shares responsibility for remedying wrongful convictions.¹⁸⁰

Who has a stake in this situation and what is the appropriate process to involve stakeholders? This again would be a collaborative effort among community members including family, criminal justice personnel, service agency representatives, neighborhood association members, crime victims, union officials, and education, religious, and media representatives.¹⁸¹ The plan formed by this collaborative effort would be filed within 60 days of release, either with the secretary of state or attorney general.¹⁸²

While traditional reentry programs are premised on the notion that the participants committed crimes for which they were properly convicted and served their time, exonerees post-release services should be provided both as a means of ensuring successful reintegration and as part of an effort to make whole exonerees who have been injured by errors in the administration of the criminal justice system that led to their wrongful conviction.¹⁸³ Massachusetts, as among the first states to provide exoneration services in addition to monetary compensation, has implicitly recognized that the loss should be borne by the community as

176. Burnett, *supra* note 10, at 282.

177. *Id.* at 283.

178. *Id.* at 284.

179. *Id.* at 284.

180. *Id.*

181. *Id.* at 286.

182. *Id.*

183. Jennifer L. Chunnias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008).

a whole and not by the injured individual alone.¹⁸⁴ Rather, it is the obligation of the states to attempt to make exonerees "whole" by providing access to meaningful services to address the negative impacts of wrongful imprisonment on every aspect of their lives.¹⁸⁵

Unfortunately, simply making the reentry services that are already in place for parolees available for exonerees is not a viable solution. Prisoner reentry programs are largely inappropriate for individuals who are actually innocent of the crimes for which they were imprisoned, because the programs are generally premised on the notion that participants were guilty of the crimes for which they were imprisoned; these programs are often reminiscent of prison in their structured rules and strict curfews, which are presumably intended to increase the likelihood that parolees will not recidivate.¹⁸⁶ Although exonerees experience many of the same symptoms of "institutionalization" and other detrimental impacts of prison as other inmates, many of an exoneree's needs and issues are completely distinct.¹⁸⁷

Hence, so as not to inflict further injury upon the wrongfully convicted by forcing them into programs that are inappropriate and only serve to remind them of the strictures of prison life, reentry services for exonerees must be sensitive to the particular reintegration issues and obstacles that face this population.¹⁸⁸ What may be lacking in the Massachusetts statute¹⁸⁹ is the fact that programs offered and made available to post-conviction exonerees, are programs that already exist and are available to the qualifying public at large. While the existing compensation schemes like those that exist in Massachusetts, Louisiana, and Vermont lead the charge by providing services in addition to monetary compensation, a more individualized approach tailored to the unique needs of the wrongfully convicted needs to take center stage in redressing the harm that was done by the State.¹⁹⁰

We can start by shifting the burden of proof in wrongful conviction claims once it has been determined that an individual is factually innocent. Plaintiffs in New York have the burden of proving innocence by clear and convincing evidence.¹⁹¹ The Court of Appeals

184. Chunias & Aufgang, *supra* note 183, at 125.

185. *Id.* (Massachusetts statute providing a hearing process for expungement or seal of records relating to the erroneous conviction).

186. *Id.* at 127.

187. *Id.*

188. *Id.*

189. See MASS. GEN. LAWS ch. 258D, § 5(A) (2004).

190. Chunias & Aufgang, *supra* note 183, at 108; MASS. GEN. LAWS ch. 258D, § 5(A) (2004); LA. REV. STAT. ANN. § 15:572.8 (2005); VT. STAT. ANN. tit. 13, § 5574 (2007).

191. Burnett, *supra* note 10, at 276.

of New York discussed this requirement, observing that it places the claimant in the difficult position of proving a negative.¹⁹² Instead of further burdening the victim, a no-fault scheme should be put into place, putting the burden on the state as to why an individual is not qualified for compensation. A wrongful conviction administrative agency should be mandated in every state to monitor and enforce compensation as a *per se* matter of right. Greater emphasis should be placed on individualized plans for reentry, using the restorative justice model similarly suggested by Cathleen Burnett to better serve the unique challenges that face those who have been wrongfully convicted. Seeking a second chance should not be a chore. It is a right that needs to be restored. The restoration of which should come from the very hand that took it away.

Conclusion

In June 2013, Colorado became the latest state to provide compensation to the wrongfully convicted via state statute.¹⁹³ The Colorado legislature found that an innocent person who has been wrongfully convicted of a felony has been uniquely victimized, has distinct problems reentering society, has difficulty achieving legal redress due to a variety of substantive and technical obstacles in the law, and should have an available means of redress beyond the existing tort remedies to seek compensation for damages.¹⁹⁴ In addition to the monetary award, exonerees and their children become eligible for tuition waivers at state institutions of higher education, and any child support an exoneree accumulated during their incarceration are similarly waived.¹⁹⁵

While compensation schemes like these offer a measure of relief to those who have had their lives taken away, the lack of uniformity among the fifty states does little to enhance the integrity of our criminal justice system. When confronted with the error of convicting the wrong person, instead of immediately seeking to undo the wrong, we have seen how the process of exoneration contributes to the prolonged struggle for a second chance at a stolen life. From the legal battles in court that can take years to see results, to private congressional bills that often require an exceptionally egregious wrong as a prerequisite, the existing frameworks across the nation is grossly inadequate.

192. Burnett, *supra* note 10, at 276

193. H.B. 13-1230, 69th Gen. Assemb., Reg. Sess. (Colo. 2013) (enacted).

194. *Id.*

195. *Id.*
